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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

IMAGITAS, INC.,

Plaintiff and Respondent,

v.

JONATHAN SHIFF,

Defendant and Appellant.

D052877

(Super. Ct. No. GIC869778)

APPEAL from a judgment of the Superior Court of San Diego County, Linda Quinn, Judge. Affirmed.

The issue in this case is whether Code of Civil Procedure<sup>1</sup> section 664.6, which pertains to settlements between parties to pending litigation, or the confession of judgment statutes (§ 1132 et seq.), which pertain to settlements between parties when no litigation is pending, governed Jonathan Shiff's motion to vacate a judgment in favor of Imagitas, Inc. (Imagitas) as void. Shiff was not a party to the original complaint against

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<sup>1</sup> All statutory references are to the Code of Civil Procedure.

his company, Professional Satellite & Communications, LLC (ProSat), but he entered into a stipulated settlement that deemed the complaint amended to add him as a defendant, and he made a general appearance by settling the matter on the merits. As Shiff was a party to the litigation, the trial court correctly applied section 664.6 and determined he was not entitled to relief because he showed no extrinsic fraud or diligence. We affirm the judgment.

### FACTUAL AND PROCEDURAL BACKGROUND

Imagitas published a change of address kit in conjunction with the United States Postal Service, and a guide for vehicle owners to register their vehicles. In contracts, ProSat agreed to pay Imagitas for the placement of advertising in these publications. ProSat's principals were Shiff, Mark Hagen, Kory Madison and Cem Esin. Shiff is an attorney admitted to the California bar.

In July 2006 Imagitas sued ProSat for breach of contract and account stated based on ProSat's default on contractual payments. On July 31, 2006, the court entered a temporary protective order (TPO) that prohibited ProSat from transferring any cash in its accounts at Union Bank of California. On August 2, 2006, the TPO was served on ProSat.

On September 14, 2006, the court tentatively granted Imagitas's application for a writ of attachment for \$2.9 million against ProSat's assets, including the Union Bank accounts. On September 26, the court issued a writ of attachment, and Imagitas soon subpoenaed ProSat's records from Union Bank.

In January 2007 Imagitas applied ex parte for an order to show cause (OSC) why a contempt citation should not issue against ProSat and its principals for violation of the TPO. Imagitas submitted Union Bank records showing that in September 2006 ProSat paid Shiff \$287,500, and paid Madison and Esin each \$137,500.

On January 12, Imagitas filed a motion for leave to file a first amended complaint to add ProSat's principals as defendants on causes of action for the recovery of \$562,500 in fraudulent transfers made after the TPO was issued, and to assert those claims against ProSat as the transferee. The amended complaint also alleged on information and belief that during the four years preceding the filing of the ProSat suit, it fraudulently conveyed \$27 million to its principals. The court issued an OSC and scheduled a hearing for February 8 on that matter and the motion for leave to amend.

On February 6, 2007, ProSat substituted in Virginia Gaburo as its attorney of record in this case. The court's minutes from a February 7 case management conference state the case had settled in its entirety. As a result, the court canceled the February 8 hearing pertaining to the culpability of ProSat's principals.

On February 8, a Stipulation for Settlement (Stipulation) was filed, which names Shiff, Hagen, Madison and Esin as defendants as well as ProSat. The Stipulation acknowledges that ProSat had moved to amend the complaint to include these principals on the ground they "jointly withdrew in excess of \$27 million from ProSat at various times since September 15, 2003, while ProSat was insolvent." Further, the Stipulation states the parties "*agree that [Imagitas's] motion for leave to amend its complaint be allowed, and the proposed First Amended Complaint be deemed filed.*" (Italics added.)

The Stipulation allowed judgment to be entered for Imagitas for \$2,960,439, against ProSat and the individual defendants. Under the Stipulation, execution of judgment was stayed pending the defendants' joint and several satisfaction of a payment schedule. On February 26, 2007, the court entered a Judgment by Stipulation (Judgment), which ProSat's principals also signed. Imagitas promptly gave notice of entry of the Judgment.

ProSat satisfied its payment obligations until July 2007, after which it and the individual defendants defaulted on the Stipulation and Judgment. At some point, ProSat went into bankruptcy.

In December 2007 Imagitas sued Schiff and Resco Properties, LLC (Resco), to set aside fraudulent transfers and for related counts. The complaint alleged Schiff created Resco and transferred numerous real properties he owned to it for no consideration to avoid paying the Judgment in this action.

On January 7, 2008, Schiff and Hagen for the first time challenged their personal guarantees by, through new counsel, moving to set aside the Stipulation and Judgment on the ground of extrinsic fraud. The original documents were not located, and they argued their signatures on faxed copies of the documents were forged. They also argued that since they were not parties to the suit, Imagitas "essentially had a judgment by confession entered against Schiff and Hagen without satisfying the strict statutory requirements applicable thereto."

Schiff submitted a declaration that stated he never signed the Stipulation and made it clear during settlement negotiations that he would not provide a personal guarantee; on January 31, 2007, he received drafts of the Stipulation and Judgment, but he did not

review them because he was going through a divorce and had other personal problems; on February 1, Attorney Gaburo faxed him a copy of the Stipulation, but he was unaware of it since he was traveling at the time; he did not return home until late on February 5; and the next day he was busy with his son's birthday. Thus, he never reviewed the Stipulation.

Shiff also presented a declaration by handwriting expert David Oleksow, which stated it was unlikely that Shiff and Hagen signed their own names on the Stipulation and Judgment. Interestingly, however, the report also stated Shiff and Hagen "cannot be . . . eliminated as being the writers of the opposite parties [*sic*] signatures at this time."

In its opposition, Imagitas submitted a declaration by its counsel, Robert Hamer. It stated that the joint and several liability of ProSat's principals was a nonnegotiable point in the settlement. The principals initially objected to providing personal guarantees, but they eventually agreed. Imagitas had learned the principals sought to sell their interests in ProSat to Nayna Networks (Nayna) in exchange for Nayna stock and consulting or managerial positions with Nayna, but the deal was contingent on the resolution of this litigation. Further, Imagitas had discovered the principals withdrew cash from ProSat's bank account in violation of the TPO and may have rendered the company insolvent by raiding its assets.

Imagitas also produced evidence that indicated Shiff was involved with the settlement and knew his name was on the signature page. On January 26, 2007, Shiff sent Martin Brill, one of ProSat's attorneys, an e-mail that stated Shiff could not represent ProSat as its attorney, and thus Brill should put Attorney Gaburo's name on the settlement

documents. The e-mail stated that Madison, a ProSat principal, "will assist in getting her on board and advising the partners." Brill responded to Shiff the same day in an e-mail that stated, "Attached are the Stipulation . . . and the Judgment . . . which I have changed to reflect [Gaburo] as counsel for ProSat." On January 25, Brill wrote in an e-mail to Hamer, copied to Madison, that the proposed Stipulation and Judgment "are acceptable to ProSat *and the individual defendants*" with minor changes. (Italics added.) The e-mail stated that "[s]ince you [Imagitas] are getting the Judgment . . . against all defendants, I assume this [requested change] shouldn't be a deal breaker." The e-mail closed with, "*The Defendants are all ready to sign the attached version of the Stipulation. . . .*" (Italics added.)

Imagitas also produced a January 29, 2007 letter from Gaburo, the ProSat attorney who substituted into this case before the settlement documents were filed, to Shiff, which stated, "It would be most economical for you to finalize this," and asked, "*Have all partners executed the Stipulation . . . and the Judgment . . . ?*" (Italics added.) In a February 5 e-mail to Shiff, Gaburo wrote: "the documents I sent to you on Thursday night are the final settlement documents and need to be signed and initialed *by all partners*, as I described to you in my fax of February 1. Can you please forward them to all partners immediately." (Italics added.) A February 6 fax cover sheet from Gaburo to

Shiff states, "Have *all the members* sign the Judgment . . . and Stipulation . . . and fax back as soon as possible."<sup>2</sup> (Italics added.)

Imagitas also submitted the declaration of Michael MacKinnon, one of its attorneys. The declaration states: "Because *Ms. Gaburo informed me that . . . all the [ProSat] members had consented to the settlement, and provided me with the signed and initialed Stipulation and Judgment*, my office advised the Court of the parties' settlement and requested that the [OSC] hearing scheduled for February 8, 2007 be taken off the court's [c]alendar." (Italics added.) In a February 6 letter faxed to MacKinnon, Gaburo wrote, "Enclosed herein please find the Stipulation . . . and Judgment . . . *executed by all of my clients*." (Italics added.) The letter also stated, "Three of my clients are aware that they have neglected to initial pages 3 and 4 of the Stipulation . . . and I should be able to get you those pages no later than tomorrow."

Additionally, Imagitas submitted a declaration by Madison, which explained that between late 2006 and early 2007, ProSat's principals had several meetings and phone calls, with and without legal counsel present, concerning settling with Imagitas. In January 2007 they discussed the benefits of settling without further litigation, particularly since there were contempt proceedings pending against them and Imagitas had moved for leave to amend the complaint to add them as defendants. The declaration states:

"Obviously, none of us wanted to take on personal liability, but we all ultimately agreed

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<sup>2</sup> At the request of the trustee in ProSat's bankruptcy proceeding, Gaburo provided the trustee with these communications between her and Shiff subject to a limited waiver of the attorney-client privilege.

to do so because the benefits of settlement outweighed the risks. The four of us communicated our agreement to the terms of the settlement, including the personal liability, with each other and with [ProSat's] counsel, Martin Brill." Brill sent the principals copies of the Stipulation and Judgment, and on February 6, the principals met in a large office at ProSat that Shiff and Hagen shared. They again discussed the pros and cons of settling, "including a concern about what would happen if the Nayna sale would not close." They again decided to proceed with the settlement. Madison and Esin signed the Stipulation and Judgment and left the room. As Madison was leaving, "Shiff and Hagen were laughing loudly, and joked, . . . that *they should sign each other's names on the documents.*" (Italics added.)

The court rejected Shiff's argument pertaining to confession of judgment law (§ 1132 et seq.) and found section 664.6 controls since Shiff was a party to this litigation. The court found Shiff did not meet his burden of showing extrinsic fraud and diligence, and accordingly denied his motion to set aside the Judgment as void.

## DISCUSSION

### I

Shiff contends the court erred by finding section 664.6 controls rather than the law regarding confessions of judgment (§ 1132 et seq.). He asserts that had the court applied the correct standard, it would have found in his favor and voided the Judgment. We are unpersuaded.

"Section 664.6 provides a summary procedure by which a trial court may specifically enforce an agreement settling pending litigation without requiring the filing



of a second lawsuit." (*Kirby v. Southern Cal. Edison Co.* (2000) 78 Cal.App.4th 840, 843.) Section 664.6 provides in relevant part: "If *parties to pending litigation* stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion may enter judgment pursuant to the terms of the settlement." (*Ibid.*, italics added.) The plain language of section 664.6 shows "the Legislature intended the section to provide a means of enforcing settlement agreements entered into after litigation has been filed." (*Kirby v. Southern Cal. Edison Co.*, *supra*, at p. 845.)

"A judgment by confession may be entered *without action* either for money due or to become due . . . in the manner prescribed by this chapter." (§ 1132, subd. (a), italics added.) To satisfy constitutional due process standards, a "judgment by confession shall be entered only if an attorney independently representing the defendant signs a certificate that the attorney has examined the proposed judgment and has advised the defendant with respect to the waiver of rights and defenses under the confession of judgment procedure and has advised the defendant to utilize the confession of judgment procedure. The certificate shall be filed with the filing of the statement required by Section 1133." (§ 1132, subd. (b); *Magalnick v. Magalnick* (1979) 98 Cal.App.3d 753, 755-757; *County of Ventura v. Castro* (1979) 93 Cal.App.3d 462, 468-469.) Section 1133 requires the defendant to file a verified statement that authorizes the entry of judgment for a specified sum; "state[s] concisely the facts out of which [the debt] arose, and show[s] that the sum confessed therefor is justly due, or to become due"; and for a contingent liability "state[s]

concisely the facts constituting the liability, and show[s] that the sum confessed therefor does not exceed the same." (§ 1133, subd. 1 – 3.)

According to Shiff, section 664.6 is inapplicable because he was not a party to this action and he was not served with the summons and complaint. The Stipulation, however, (1) acknowledges that Imagitas had moved to amend the complaint to add ProSat's four principals as defendants based on their violation of the TPO and their withdrawal of \$27 million from ProSat while it was insolvent, and (2) clearly states the parties agreed that the motion for leave to amend "be allowed, and the proposed First Amended Complaint be *deemed filed*." (Italics added.) The amended complaint naming Shiff as a party was deemed filed as of the date of the Stipulation or no later than when it was filed.

It is immaterial that Shiff was not served with a summons and amended complaint because he voluntarily made a general appearance when he entered into the Stipulation and Judgment in favor of Imagitas on the merits. "A valid judgment imposing a personal obligation or duty on a person may be entered only by a court having jurisdiction over that person." (*In re Marriage of Nosbisch* (1992) 5 Cal.App.4th 629, 633.) The "court in which an action is pending has jurisdiction over a party from the time summons is served on him." (§ 410.50, subd. (a).) However, a "general appearance by a party is equivalent to personal service of summons on such party." (§ 410.50, subd. (a).) " 'A general appearance operates as a consent to jurisdiction of the person, dispensing with the requirement of service of process, and curing defects in service.' " (*Dial 800 v. Fesbinder* (2004) 118 Cal.App.4th 32, 52.) " 'A general appearance occurs where a

party, either directly or through counsel, participates in an action in some manner which recognizes the authority of the court to proceed.' " (*Ibid.*)

It is well established that the execution of a stipulation for entry of judgment constitutes a general appearance. (*Adoption of Matthew B.* (1991) 232 Cal.App.3d 1239, 1270; *Title Guarantee & Trust Co. v. Griset* (1922) 189 Cal. 382, 390; *Cooper v. Gordon* (1899) 125 Cal. 296, 301.) As a matter of law, Shiff was a party to pending litigation when the Stipulation and Judgment were entered, the court had personal jurisdiction over him, and section 664.4 controls whether he is entitled to any relief. The confession of judgment statutes are irrelevant because they apply only when an action against the settling party is not pending.<sup>3</sup> Thus, contrary to Shiff's contention, Imagitas had no burden of proving by clear and convincing evidence that he waived his constitutional due process rights.

## II

Shiff sought to set aside the Judgment as void based on extrinsic fraud. After the time for an ordinary attack on a judgment has expired (see § 473, subd. (b) [allowing up to six months to challenge a judgment entered through mistake, inadvertence, surprise or excusable neglect]), a party may obtain relief from an erroneous judgment by establishing it was entered through extrinsic fraud. (*Warga v. Cooper* (1996) 44 Cal.App.4th 371, 376.) " "To warrant relief on this ground, the moving party must establish: (1) facts

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<sup>3</sup> We deny Imagitas's request that we take judicial notice of the legislative history of amendments to section 1132 et seq. as statutory construction is not required. The plain language of the legislation shows it is inapplicable here. (*Peninsula Guardians, Inc. v. Peninsula Health Care Dist.* (2008) 168 Cal.App.4th 75, 87 & fn. 7.)

constituting extrinsic fraud . . . ; (2) a substantial defense on the merits; and (3) diligence in seeking relief from the adverse judgment.' " (*Ibid.*) "The court may grant relief under its inherent equity power if, because of the fraud of his opponent, the aggrieved party was prevented from presenting his claim or defense to the court. [Citations.] . . . The vital question is 'whether the successful party has by inequitable conduct, either direct or insidious in nature, lulled the other party into a state of false security.' " (*Aheroni v. Maxwell* (1988) 205 Cal.App.3d 284, 291.)

Shiff does not challenge the sufficiency of the evidence to support the court's findings he neither showed any extrinsic fraud nor diligence, elements required to vacate a judgment entered under section 664.6. Certainly, there is substantial evidence to support a finding that Shiff and Hagen signed the Stipulation and Judgment for each other, presumably to create an opportunity to later challenge the validity of the documents and avoid the personal liability they agreed to shoulder. To accept Shiff's claim, the court would have had to believe that Brill and Gaburo, as officers of the court, misrepresented that ProSat's principals had agreed to be personally liable and had signed the Stipulation and Judgment. Relief will be denied, of course, when the complaining party has caused or contributed to the fraud giving rise to a judgment. (*In re Marriage of Carletti* (1975) 53 Cal.App.3d 989, 993.)

DISPOSITION

The judgment is affirmed. Imagitas is entitled to costs on appeal.

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McCONNELL, P. J.

WE CONCUR:

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HUFFMAN, J.

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McINTYRE, J.